RECENT CASES.

AGENCY — RATIFICATION. — A, a collector employed by B, deposited in the defendant bank, without the knowledge of B, certain sums of money, designating as payee in the bank register "B, by A." Six certificates of deposit at different times were thus issued to A, payable to the order of B, and all were subsequently paid to A, upon being indorsed "B, by A." The certificates of deposit were never in B's possession, and it did not appear but that each new certificate was procured partly or wholly with funds derived from payment of the previous one. Upon A's death, B, for the first time learning the facts, sued the bank for the total face value of the certificates. *Held* (two judges dissenting) — The depositing and the withdrawing were distinct acts, so that one can be ratified without the other. The plaintiff is entitled to the face value of the certificates. *Honig* v. *Pacific Bank*, 15 Pac. Rep. 58 (Cal.).

AGENCY — RATIFICATION. —The superintendent of the cloak department in a dry-goods store had authority to purchase for that department, and all invoices and correspondence relating to it were at once turned over to him. The plaintiff's salesman applied to him for orders, and was told that the stock was already larger than the firm allowed, but that, if no statements of account would be sent to the firm, goods might be sent on with invoices as usual, and he would pass the invoices as fast as he could. The plaintiffs were informed of the scheme and assented to it. Large quantities of goods were sent under this arrangement, and many of them disposed of in the usual course of trade. When the defendants learned of these transactions they found it impossible to distinguish goods that had not been paid for, and they were sold in the usual way, but other goods afterward received from the plaintiffs were returned. It was held that selling the goods under these circumstances was not a ratification of the acts of the superintendent, and the plaintiffs could not recover for goods bargained and sold, but there was an intimation that they might have other remedies. It was further held that mailing invoices to the defendants' address did not affect them with notice that the goods had been sent. *Schutz* v. *Jordan*, 32 Fed. Rep. 55.

AGENCY — USURY — RESERVATION OF AGENT'S COMMISSION. — The plaintiff's agent, in negotiating a loan to the defendant, took a note bearing the highest legal rate of interest, and reserved a small portion of the money lent as compensation for his services. It was not shown that the principal knew of this charge. *Held* — "The authorities are overwhelming that the contract is not usurious." *Williams* v. *Bryan*, 5 S.W. Rep. 401 (Tex.).

The Court say: "Whether in a transaction of this character, a payment by the borrower to the agent of the lender of a fair compensation for his services in effecting the loan, though with the knowledge and consent of the latter, should in any case be held to make the contract usurious, may be doubted." The loan was held to be usurious where an excessive compensation was retained by the agent with the knowledge of the principal, in *Pfenning* v. *Scholer*, 10 Atl. Rep. 833 (N.J.). It is held in *Barton* v. *Farmers' & Merchants' Nat'l Bank*, 13 N. E. Rep. 503 (Ill.), that a promissory note providing that in case of non-payment when due, if placed in the hands of an attorney for collection, an attorney's fee of $30 shall be paid by the maker, is not usurious. It cannot matter that the contract for compensating the attorney is executory, not executed.

CERTIFICATE OF DEPOSIT — STATUTE OF LIMITATIONS. — A certificate of deposit is a promissory note, and recovery is barred after the lapse of six years from its date. *Mitchell* v. *Wilkins*, 33 N.W. Rep. 910 (Minn.).

The Court say that, being promissory notes, they should follow the same rules for the sake of uniformity. The fundamental error was in holding notes payable "on demand," to be due immediately without demand. And there seems to be no good reason for extending the principle to certificates of deposit, but three reasons for not so doing: (1) They contain a stipulation "to be paid on the return of the certificate properly endorsed," which, being part of the contract should be heeded just as "on demand" should have been in the case of

demand notes. (2) The custom of bankers to pay at their banking-houses and not where they find the certificate, as is the case with notes. (3) The analogy of bank-notes, which have repeatedly been held not within the statute.

The weight of authority is probably adverse to *Mitchell* v. *Wilkins*. See *contra*, *Birch* v. *Fisher*, 51 Mich. 36 (*semble*); *Lynch* v. *Goldsmith*, 64 Ga. 42, 50 (*semble*); *McGough* v. *Jamison*, 4 Pennyp. (Pa.) 154; *Fells Point Inst.* v. *Weedon*, 18 Md. 320; *Bellows Falls Bank* v. *Rutland Bank*, 40 Vt. 377; *Munger* v. *Albany Bank*, 85 N.Y. 580; *Smiley* v. *Fry*, 100 N.Y. 262; *Rentchler* v. *Kunkelman*, 17 Bradw. (Ill.) 343; *Shute* v. *Pacific Bank*, 136 Mass. 487; *Girard Bank* v. *Bank of Penn.*, 39 Pa. 92.

Accord, *Tripp* v. *Curtenius*, 36 Mich. 494; *Brummagin* v. *Tallant*, 29 Cal. 503; *Curran* v. *Witter*, 31 N. W. Rep. 705 (Wis.).

For many cases on the subject see "Review of case *Citizens' Bank* v. *Brown*" (Ohio), Chicago Leg. News, Sept. 10, 1887.

CONVERSION — CHATTEL MORTGAGE. — A gave a chattel mortgage to B with a clause empowering B to sell on default of any condition in the mortgage, and also authorizing him, for further security, to take possession of the chattel at any time. Before the mortgage became due B took possession under the last clause, and having threatened to sell it, A tendered him the amount of the debt and interest, but he refused it and sold the chattel. Trover was brought at once, and allowed. *Harder* v. *Hosp*, 34 N.W. Rep. 145 (Wis.).

The Court do not suggest how they support the action without right of possession in the plaintiff.

CORPORATION — CHARTER — LIABILITY AFTER A LEASE. — A street-car company by its charter was made liable for all injuries caused by the negligence of its servants in operating the road. The company leased its property to a second company, which agreed to assume all liability, defend all suits, and pay all judgments against the lessor company. The lease was subsequently sanctioned by an act of the Legislature, which did not expressly exonerate the lessor from liability. The plaintiff was injured by the negligence of the servants of the lessee. *Held* — The lessor could not relieve itself of liability without the consent of the State. A note collects a number of recent cases to the same effect. *Breslin* v. *Somerville Horse R. Co.*, 13 N.E. Rep. 65 (Mass.).

EASEMENT — STREETS — TELEPHONE POLES. — The defendant, with the consent of the city of St. Paul, erected poles in front of plaintiff's lot. The fee of the street was in the plaintiff. The Court below ordered the poles removed, and granted a perpetual injunction. The Chief-Justice being ill, the four remaining judges are equally divided, and the judgment is confirmed. They give no reasons, and say: "We can render no decision which can be deemed to establish the law." *Willis* v. *Erie Co.*, 34 N.W. Rep. 337 (Minn.).

EQUITY JURISDICTION — BILL OF PEACE. — The plaintiff leased quarry lands from the assignor of the defendant. The assignor, as well as the defendant, used the land as a farm. The defendant commenced to quarry marble. The bill alleged that the quarrying of every stone was a trespass, and, to prevent a multiplicity of suits, asked for an account of the stone taken out and an injunction to restrain future trespasses. Relief granted. *Dougherty* v. *Chesnutt*, 5 S.W. Rep. 444 (Tenn.)

In point of jurisdiction this seems a departure from common-law rules. The question of whether or not an act is a trespass is a common-law question, to be determined by a common-law court with a jury. Even in those States where equity and law are united, the question of trespass is submitted to a jury, though a separate action is not necessary. But in Tennessee, where such seems not to be the case, the plaintiff should first have been compelled to establish the fact of trespass at law, and then equity would grant an injunction to prevent multiplicity of suits.

EQUITY JURISDICTION — ENFORCING PAROL GIFT OF LAND. — Equity will enforce specific performance of a parol gift of land, where it is accompanied by possession and valuable improvements on the part of the donee relying on the promise of the donor. *Dawson* v. *McFaddin*, 34 N.W. Rep. 338 (Neb.).

EQUITY JURISDICTION — RESTRAINING CRIMINAL PROSECUTION. — An action had been commenced in a State Court to have a brewery abated as a nuisance,

The case was removed to the Circuit Court. While it was there pending, the defendant applied to the same Court for an injunction, alleging that numerous prosecutions were being brought against him for separate sales of beer, and that his business would be destroyed and his property rendered valueless if they were allowed to proceed. The application was refused. "Courts of equity, therefore, deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases, and they will not, therefore, interfere by injunction with the course of criminal justice." *Suess* v. *Noble*, 31 Fed. Rep. 855.

EQUITY JURISDICTION — SPECIFIC PERFORMANCE. — Mortgagees were selling property at auction under foreclosure. An agent of the mortgagor put in a bid to run the price up, with no intention of completing the purchase. The defendant was thus induced to raise his former bid. But, on learning the facts, he refused to complete, on the ground that his bid had been obtained by fraud. *Held* — That specific performance must be given, as the vendors knew nothing of the fraud. *Union Bank of London* v. *Munster*, 84 L. T. 8.

HOMICIDE — MORAL INSANITY — INTOXICATION. — An irresistible impulse to do an act known to be wrong and punishable is no defence. Nor is voluntary intoxication a defence, but evidence of it is admissible when the question is as to intent. *State* v. *Mowry*, 15 Pac. Rep. 282 (Kan.).

A note collects recent cases on the test of criminal responsibility, and on the burden of proof when insanity is set up as a defence.

JUDICIAL NOTICE. — The plaintiff was convicted of a burglary alleged to have been committed in Cook county. The proof showed simply that it was committed in Chicago. *Held* — The Court will take judicial notice that Chicago is in Cook county. *Sullivan* v. *People*, 13 N. E. Rep. 248 (Ill.).

LETTERS — RIGHT OF RECEIVER TO SELL. — The receiver of a letter has only a qualified property in it, the general property remaining in the writer. This applies to letters other than those valued as literary compositions. Therefore the receiver cannot sell without the consent of the writer. *Rice* v. *Williams*, 20 Chicago Legal News, 53; 32 Fed. Rep. 437.

MORTGAGE — SUBSEQUENT LEASE BY A MORTGAGOR. — A mortgagor let a house at a yearly rent, payable quarterly. After one quarter's rent had been paid to him, the mortgagee gave notice to the tenant to pay the rent to him in the future. The mortgage was transferred, and notice of the transfer was given to the tenant. The receiver of rents due to the mortgagor applied to the tenant for the next quarter's rent, but he paid it instead to the transferees of the mortgage. It was held that the proper inference from the tenant's remaining in possession after notice to pay rent to the mortgagee was that he assented to become his tenant, and therefore he was justified in paying rent to the assignees of the mortgage, and need not pay it to the receiver of the mortgagor. *Underhay* v. *Read*, 45 W. N. 188.

This appears to be a return to the thoroughly discredited doctrine of *Pope* v. *Biggs*, 9 B. & C. 245. Even if the inference were a necessary one, it would not follow that the lessee had ceased to be tenant to the mortgagor because he had become tenant to the mortgagee. Payment of rent to the latter is not a defence to an action by the former, but at most a counter-claim. The lessee is still tenant by estoppel to the mortgagor, under the old law. This case holds in effect that this relation was terminated by a *constructive* eviction.

NEGLIGENCE, PRESUMPTION OF. — The defendant operated a steam tow-boat, the boiler of which exploded, doing great injury to the plaintiff's boat. The tow-boat was not licensed under United States statutes requiring boilers to be examined by an inspector. *Held* — The defendant was liable on proof of the above facts without proof of negligence. *Van Orden* v. *Robinson*, 36 Alb. L. J. 403; 46 Hun, 567.

PARTNERSHIP — ACCOMMODATION NOTE. — The defendant's partner without authority gave a note by way of accommodation. The note came into the hands of a bank, and another was given in renewal of it, the bank being then aware that the original was given without authority. It did not appear that this was known when the bank first received the note, and for this reason recovery was

allowed. *Union Bank of Lower Canada* v. *Bulmer*, 10 Legal News, 361 (Supreme Court of Canada).

The original note being good against the firm, the renewal of it is partnership business.

PLEDGE — DISCHARGE. — A made a note payable to B or bearer, secured by a real mortgage. B delivered it before maturity to C as collateral security for a pre-existing debt of larger amount. A, not knowing of the transfer, paid the note in cotton to B, who had no authority to receive payment. B converted the cotton into money and remitted it in a check for a larger sum to C. C, in ignorance of how the money was obtained, credited it to B on his debt. A large balance being still due from B, C commenced statutory proceedings against A to foreclose the mortgage, to which A pleaded payment. *Held* — The debt from A to C was discharged. *Coleman* v. *Jenkins*, 3 S. E. Rep. 444 (Ga.).

The Court went on the ground that if A had paid C instead of B, C would have been in exactly the position in which he now is, only he would have had to credit A as well as B. This would seem rather a moral than a legal reason why C should not prevail. When B received the cotton without authority, the legal title passed to him subject to an equity in favor of A. Had B paid this cotton on his own account to C, C would have taken the title free from all equities as a purchaser for value without notice, the value being the giving up *pro tanto* of his claim against B. That C could have retained the cotton, see *Baldwin* v. *Burrowes*, 47 N. Y. 199; *Thatcher* v. *Craig*, 113 Mass. 291; *Pope* v. *Lowitz*, 14 Bradw. 96 (Ill.). The case of payment of money by B is even stronger, for C could have kept it if B had stolen it from A. C has the right to say, "Having no notice, I dealt with this money as B's own, and credited it in discharge of his obligation; I have never consented to discharge my security; it is as if B had defrauded A and paid me the money." A's obligation, at his peril, was to pay the note to the bearer, and he was guilty of gross negligence in not requiring his note from B. Under the plea of payment he was allowed to show an unauthorized payment to B, who commingled the proceeds in a larger sum, which he paid to C on his own account. If A's note was a perfect obligation at law, how could equity refuse to foreclose the mortgage securing it?

PROMISSORY NOTE — ILLEGALITY — GAMBLING. — Several persons were playing at dice for money. In the course of the game one of the players borrowed of another various sums, amounting in all to $350. At the close of the game he gave his note for this sum. The lender did not win any of the money. *Held* — That he could enforce the note. *Corbin* v. *Wachhorst*, 15 Pac. Rep. 22 (Cal.).

This decision seems contrary to sound public policy. That the law is otherwise, save in New York, see Greenhood on Public Policy, 94. In *Hill* v. *Spear*, 50 N. H. 253, at p. 273, it is said, "Money loaned to a gambler for the purpose of being staked upon a pending game cannot be recovered." *Corbin* v. *Wachhorst* is not in accord with the more recent English cases, though the American decisions on the analogous cases of a sale made, or of work done, knowing that the property will be used for an illegal purpose, would generally go as far as this case. (Cases collected in 22 Alb. L. J. 405.) For an amusing statement of the modern English law of gaming promissory notes, see 21 Irish Law Times, 668.

QUASI CONTRACT — USE AND OCCUPATION. — A trespasser who uses land is not liable to the owner for use and occupation, there being no evidence of the relation of landlord and tenant between them. *Dixon* v. *Ahern*, 25 Cent. L. J. 344 (Nev.), and note with cases.

RIGHT OF WAY — PRESCRIPTION. — The lots owned by plaintiff and defendant were separated by a way, the fee in which remained in a former owner of both lots. Successive owners of each lot had used the way in common for more than forty years. The plaintiff brings trespass for interfering with his right of way. *Held* — two judges dissenting — that it will not lie, since the user proved is not exclusive. *Ellis* v. *Black*, 23 Canada Law Journal, 390 (Supreme Court of Canada).

STATUTE OF LIMITATIONS — DEMURRER. — When it appears on the face of a petition that the claim is barred by the Statute of Limitations, advantage may be taken of it by demurrer, on the ground that it does not state a good cause of action. *Merriam* v. *Miller*, 34 N. W. Rep. 625, and note (Neb.).

TRESPASS — DAMAGES. — The defendant, with notice of the plaintiff's claim to title, relying on his own supposed title, cut and carried away logs from the disputed premises. When the logs were at the mill a demand was made for them on the part of the plaintiff, and on refusal he brought this action. He was awarded the "stumpage" value of the timber, and appealed. The logs at the time of the demand were worth about twice the stump value. *Held* — The defendant having acted in good faith, the plaintiff can recover only actual damages, viz., the "stumpage" value. *Whitney* v. *Huntington*, 25 Cent. L. J. 349 (Minn.), and note. See *Isle Royale Mining Co.* v. *Hertin*, 39 Mich. 332 (also stated *supra*, p. 40).

TRUST, DECLARATION OF — IMPERFECT GIFT. — Clerke was trustee for Mrs. Hewitt, the plaintiff, and was instructed to pay off a mortgage upon her property with the trust-funds. Instead of doing so he appropriated them to his own use, but paid the interest on the mortgage regularly, and so kept the plaintiff in ignorance of his breach of trust. On his death there was found in his safe a policy of insurance on his life with an indorsement to Mrs. Hewitt on the back, and the following note to his executor: "Mr. Jones: Mr. Anderson holds a mortgage on Mrs. Hewitt's place for less than $2,000. This policy is assigned to pay that mortgage off and cancel the same, as I am under obligations to do so. I had her money loaned out, and am bound to replace it. Alfred A. Clerke." *Held* — This was a sufficient declaration of trust. Judgment for plaintiff. *Hewitt* v. *The Provident Life Trust Co.*, Superior Court, Cincinnati, O., 18 Weekly Law Bulletin, 220.

If the assignment is capable of being construed as a declaration of trust by Clerke, the decision is clearly correct. But if the indorsement and words, "this policy is assigned," simply mean that he has done everything necessary to transfer it to Mrs. Hewitt except deliver it, and expects the executor to do that, — if, in other words, the intention was to assign and not to declare a trust, the decision cannot be supported. It seems difficult to find, from the language used, an intention to hold as trustee.

A transfer of possession is necessary to make a conveyance of a policy of insurance in this country. Ames' Cases on Trusts, p. 110, *note*.

A similar point was recently decided in Chancery Division, *Re Richards*, 57 L. T. Rep. 249. The testatrix signed a note, payable on demand to her servant, and handed it to her solicitor, telling him to give it to the servant if the latter should be in her service at her death. The servant, being in her service at the time of her death, claims the amount of the note from the estate. *Held* — That the solicitor was a trustee of the note; and payment was decreed.

If the solicitor were a trustee, he must have been such only of the piece of paper, not of the obligation, since that was payable to the servant. But the custody of a piece of paper with instructions to deliver it to a third party constitutes a simple case of bailment. There is no need of invoking the doctrine of a trust, even if it were possible from the language used, since the third party has an ample remedy as beneficiary of the contract of bailment. Apart from the grounds of the decision, it was plainly wrong on the authorities, for the reason that a promissory note delivered as a voluntary gift cannot be enforced.

Another case of trust is found in 5 S. W. Rep. 441, *Templeton* v. *Brown* (Tenn.). A husband gave his wife $40,000. Being afterwards in need of money, he borrowed $10,000 from her, and gave his promissory note. On her suing his administrator on the note, it was *Held* — That he, by the execution of the note, declared himself a trustee of the $10,000.

The wife, probably, had an equitable right (see 3 DeG., J., & S. 672; 108 U. S. 66; 130 Mass. 407; 51 N. Y. 395; 8 N. J. L. Journal, 358); but that it was a trust is plainly not the case.

Sterling v. *Wilkinson*, 3 S. E. Rep. 533 (Va.), is a better case. A person, now deceased, gave bonds to the defendant, to be delivered, in case of his death, to the widow and children. A receipt for additional bonds stated that the defendant was to hold them in trust for the depositor's children. *Held* — That, on the intention gathered from all the circumstances, no trust was created, and, as the transaction was imperfect as a gift, from the fact that the testator had not parted with the control of the bonds, they were chargeable with the debts of the deceased.

VOLUNTARY CONVEYANCE — MARRIAGE SETTLEMENT. — Freeholds belonging to a widower were conveyed by a marriage settlement to his children by a former marriage. He afterwards mortgaged the same property, and it was sold under

the mortgage. The vendee objected to the title, but it was held that the settlement was voluntary, and the mortgage prevailed over it. *In re Cameron and Wells*, 45 W. N. 185.

Price v. *Jenkins*, 4 Ch. D. 483, was cited by counsel. It is directly in point, but was reversed in 5 Ch. D. 619, on another ground, and this question was left open. *Clarke* v. *Wright*, 6 H. & N. 849, which upheld a settlement on an illegitimate son of the woman, seems not to have been cited, but it was characterized in *Price* v. *Jenkins* as a case to be followed only when the circumstances are exactly similar.

WILL — CONDITION. — Land was devised in fee on condition that the legatee "take the name and bear the arms of Say." There was no gift over. The legatee entered into an agreement for the sale of the land. The purchaser objected to the title on the ground that the land would go to the testator's heir if the legatee ceased to "bear" the arms. *Held* — That the legatee, having taken the name and borne the arms, had fulfilled the condition, and could give a good title. *Re Farrar and Champion*, 84 L. T. 25.

WILL — VOID LIFE ESTATE. — A devise to A for life, remainder over to B, was void as to A by reason of her having witnessed the will. *Held* — That B was not advanced, but the life estate went to the heirs. *Elliot* v. *Brent*, 15 Wash. L. Rep. 754 (Sup. Court, D. C.). See *contra*, *Full* v. *Jacobs*, 3 Ch. D. 703.

REVIEWS.

THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS, AS FOUND IN THE AMERICAN CASES. By Hampton L. Carson, of the Philadelphia bar; Text-book series, Vol. 1, No. 1. The Blackstone Publishing Company, Philadelphia, 1887, pp. 235.

This work is bound in the same volume with "Wright on Criminal Conspiracy," and, unlike the others of the same series, is not a reprint. Mr. Carson's work was originally intended, as he says, to illustrate Mr. Wright's text "by reference to the American cases in the form of notes;" but he found so much material that he concluded to shape it into a distinct hand-book for the lawyer in active practice.

In view of the recent wide-spread labor disturbances, Mr. Carson's section entitled, "Conspiracies Relating to the Rates of Wages — Strikes and Boycotts," pages 144 to 179, will not be found the least interesting in the book. His conclusions from the cases cited, many of which are very recent, including *The Old Dominion Steamship Co.* v. *McKenna*, and *State* v. *Glidden*, is briefly as follows: Workmen may lawfully combine for many purposes, such as the raising of their wages, the prevention of overcrowding in their trade, etc. "The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation, in order to secure their ends; or where their object be to impoverish third persons, or to extort money from their employers, or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment."

On the whole, Mr. Carson's book seems to live up to the preface in a satisfactory manner. Its merit is rather as a hand-book of the latest decisions in criminal conspiracy, than as a very learned or scientific treatise on the subject. B. G. D.